In The
Supreme Court of the United States

No. 242

VERNIE BAILESS, County Treasurer, Caddo County, Oklahoma, and W. B. COLEMAN, Assessor of Caddo County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS OF CADDO COUNTY, OKLAHOMA, composed of TED A. JONES, FRANK DUNCAN and GEORGE D. NIXON,

Petitioners,

VERSUS

JUANA PAUKUNE,

Respondent.

REPLY BRIEF OF PETITIONERS

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TABLE OF CASES

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In our original Brief we stated as a fact that the Secretary of the Interior had long construed the General Allotment Act and the case of *Levindale Lead & Zinc Mining Co.* v. *Coleman*, 241 U.S. 432, which case involved the properties of the Osages, as applying to properties of those Indian Tribes who received their allot-

ments under the General Allotment Act. This is the only fact stated in our Brief that is disputed by respondent. We are of the opinion that the Commissioner of Indian Affairs' letter of June 14, 1930, which is set forth at length as Appendix II of our original Brief, unquestionably supports our statement. If there is any doubt as to the correctness of our statement we suggest that the Secretary of the Interior or Commissioner of Indian Affairs should be requested to file a Brief herein and set forth his Petition on the issue presented by this proceeding.

The respondent also agrees with us on the proposition that the sole issue presented by this proceeding is whether or not the interest of a non-Indian devisee or heir in land allotted under the General Allotment Act is immune from a nondiscriminatory ad valorem tax prior to the expiration of the Trust Period and the issuance of a fee patent to the devisee or heir.

The petitioners and respondent are in sharp conflict on the answer to the foregoing issue. While respondent makes no criticism of the *Levindale case* and the other cases cited in our original Brief that follow that case, they assert in effect that the *Levindale case* (the other cases are not mentioned) can be distinguished from the instant case. She makes the broad assertion that the Osage Allotment Act was enacted for the protection and benefit of Osages only and infers that the General Allotment Act was enacted for the benefit of both Indians and

non-Indians. In attempting to sustain this assertion she does not argue that the Federal Government does not hold legal title to the Trust properties of the Osages or that restrictions on alienation of such properties do not run with same in the hands of Indian heirs of Osages, and accordingly she does not urge the erroneous basis adopted by the Supreme Court of Oklahoma and its opinion herein. To the contrary, respondent argues that certain provisions of the General Allotment Act and other statutes treating with Indians generally that are hereinafter discussed sustain the decision of the Supreme Court of Oklahoma herein.

At Page 8 of her Brief, respondent attempts to distinguish the *Levindale case* from the instant case on the grounds that "(t)he Osage Act provided for the issuance of certificates of competency to Indians, but not white men, and upon the issuance of such certificate the land became subject to taxation" and that "(t)he Osage Allotment Act did not make any provision for protecting white men. It was only for the protection of Indians."

Section 6 of the General Allotment Act was amended by an Act of May 8, 1906, 34 Stat. 182, 25 U.S.C.A., Sec. 349, to read in part as follows:

> "* * * That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any *Indian allottee* is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale,

> incumbrance, or taxation of said land shall be removed * * *." (Italics ours).

Accordingly the General Allotment Act like the Osage Allotment Act provided for the issuance of fee patents to Indian allottees and not to white. (Attention is directed to Article X of the Kiowa, Comanche and Apache Allotment Agreement, 31 Stat. 672-676, Sec. 1261, Page 815, *Mills, Oklahoma Indian Land Laws*, 2nd Ed., under which allotments to some seventeen non-Indians was provided for.)

At Page 9 of her Brief, respondent attempts to further distinguish the *Levindale case* by citing and quoting a portion of the Amendment of April 18, 1912, to the Osage Allotment Act to the effect that "when the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed." Since Coleman's wife and son died in 1906, and the conveyance he sought to have set aside was made in 1909, the above quoted 1912 amendment had no bearing on the issue of whether or not, as a non-Indian, Coleman's inherited interest in the lands of the Osages was restricted and moreover, the amendment is not mentioned in the decision.

At Pages 6 and 7 of her Brief, respondent points out that 37 Stat. 678, 25 U.S.C.A., Sec. 373, which is the statute that authorizes Pau-kune to alienate his allotment by will, applies to Quapaws and that restrictions on alienation imposed by the Quapaw Allotment Act

run with the land and are binding on the allottee and his heirs. It is because such is the law that the case of *Unkle* v. *Wills* (C.C.A. 8), 281 F. 29, 35, is squarely in point. In that case the court held that the *Levindale case* applied to the non-Indian heirs of a Quapaw for the reason that the rule applied "to all Indian allotments."

With the exception of the cases hereinafter mentioned the cases cited by respondent at Pages 11 to 18 of her Brief merely hold that the restrictions against alienation imposed by the General Allotment Act run with the land but in none of the cases is it held that the restrictions are binding on non-Indian devisees or heirs. As pointed out in our original Brief and as stated at the beginning of this Brief, trust properties of the Osages are restricted in the hands of Indian heirs and such is true of the trust properties of all Indian Tribes, which means that the *Levindale case* and the cases cited in our original Brief that follow that case are as applicable to a non-Indian devisee or heir taking properties allotted under the General Allotment Act as to such an heir taking properties allotted under any other Allotment Act.

Among the cases cited by respondent at the pages of her Brief last above mentioned is *U. S.* v. *Rickert*, 188 U.S. 432. In that case Indian wards of the United States Government and not non-Indians were involved. As pointed out in our original Brief, the right to tax in

the *Rickert case* was not denied because of any inhibition contained in the General Allotment Act but to the contrary, the right to tax was denied on the grounds that the use made by the Federal Government of the property sought to be taxed was in furtherance of its program of protecting dependent Indian wards which brought about a Federal instrumentality of such a character as to be impliedly exempt under the Constitution of the United States from tax.

Bowling v. *United States*, 233 U.S. 528, involved the right of Indian heirs to convey their interest in lands allotted under an Act of March 2, 1889, 25 Stat. 1013, and not the right to tax as suggested by respondent. The Act relates to the allotment of lands to the United Peorias and Miamis, and it is therein expressly provided that the lands allotted should not be subject to taxation. It is this portion of the Act that this Court merely mentions in its decision.

In *Board of Comrs. of Caddo County, Okla.* v. *United States* (C.C.A. 8), 87 F. 2d 55, the court held that the allotment of the Wichita Indian there involved was not subject to taxation because she had not accepted the fee patent issued her. In the body of the opinion the court assumes and correctly so, that if a fee patent had been issued and accepted, the Indian's land would have been subject to an ad valorem tax.

As pointed out at Page 25 of our original Brief, *Childers* v. *Beavers*, 270 U.S. 555, has been overruled.

We assume that respondent cites and quotes from *County of Mahnomen* v. *United States*, 319 U.S. 474, in an effort to establish that respondent under *Choate* v. *Trapp*, 224 U.S. 665, had a vested right to the tax exemption that rested in her deceased Apache Indian husband under the rule laid down in *United States* v. *Rickert, supra*. *Choate* v. *Trapp* is without application for the reason, as stated in *Fink* v. *Board of Comrs. of Muskogee County, Okla.*, 348 U.S. 399, the Indian's right to a tax exemption "was a property right in the Indian, preserved to him not only for his own interest but in the interest of the policy of the United States regarding him" and cannot be claimed by a non-Indian.

See, also:

Schock v. *Sweet*, 45 Okl. 51
(affirmed 245 U.S. 192);
Scanland v. *Board of Comrs. of Ottawa Co.*, 56 Okl. 56, 155 P. 898.

At Page 16 of her Brief, respondent quotes a portion of an Act of May 27, 1902, 23 Stat. 275, 25 U.S.C.A. 379, and then says that under this Section conveyances by Indians and non-Indians alike must be approved by the Secretary of the Interior. When the entire Section is read and considered a construction entirely different from that given by respondent is reached. We quote the entire Section:

> "The adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands al-

> lotted to him may sell and convey the lands inherited from such decedent, but in case of minor heirs their interests shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the Secretary of the Interior, when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee. All allotted land so alienated by the heirs of an Indian allottee and all land so patented to a white allottee shall thereupon be subject to taxation under the laws of the State or Territory where the same is situate: Provided, That the sale herein provided for shall not apply to the homestead during the life of the father, mother or the minority of any child or children."

The phrases "adult heirs" and "minor heirs" as used in the above quoted statute do not under the authority of the *Levindale case* and the cases that follow that case (especially *Mixon* v. *Littleton*, 265 F. 603, 605) include non-Indians. It therefore follows that the statute does not require the approval by the Secretary of the Interior of deeds of non-Indians.

The only portion of the statute under discussion that attempts to refer to non-Indians is that portion to the effect that "lands so patented to a *white allottee* shall thereupon be subject to taxation under the laws of the State." The word "so" is surplusage for the reason no mention is made of whites or the issuance of patents to whites in the Act. Incidentally, the Act is in fact an appropriation bill. The respondent is admittedly not

a "white allottee" but if she were her allotment, as we construe the statute, would have been taxable from the date patented to her. Is it reasonable to assume that Congress intended that lands allotted and patented to non-Indians should be subject to taxation but that those inherited by non-Indians should not be subjected to taxation?

In *Goudy* v. *Meath*, 203 U.S. 146, the Indian contended that while he had the right to voluntarily alienate his allotment so long as he did not exercise such right his allotment was exempt from tax which is in effect the same argument as made by respondent in the instant case. The contention so made was denied and it was held in substance that since the Indian could alienate his allotment same was subject to tax.

The United States Government does not have any right, title or interest in respondent's undivided 1/3rd interest in Pau-kune's allotment and since such is true, Oklahoma is not here seeking to tax or to sell in satisfaction of a tax property of the United States Government. The respondent will concede that she is the beneficial owner of the property taxed and since she is, she as a non-Indian must show a taxing of an interest that rests in the United States Government before the right to tax and sell in satisfaction of the tax will be denied.

S. R. A., Inc. v. *Minnesota*,
327 U.S. 558;

City of New Brunswick v. *U. S.*,
276 U.S. 457;

Sexton v. *Armstrong Pork Co.*,
208 U.S. 266.

In *Thomas* v. *Gay*, 169 U.S. 264, this Court stated that,

> "* * * it is not perceived that local taxation by a State or Territory, of property of others than Indians would be an interference with congressional power."

Respectfully submitted,

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